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No. 93-1490

In the Supreme Court of the United States
October Term, 1993

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,
Petitioners,

v.

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,
Respondents.

Petition for Writ of Certiorari
to the New York State Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and the letter of consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent Commissioner of the New York State Division of Housing and Community Renewal, thereby requiring the filing of this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support

of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has appeared before this Court in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves a predatory regulatory scheme adopted by the New York State Division of Housing and Community Renewal (DHCR) to seize valuable property interests from petitioners and transfer them to private third parties without compensation. The opinion below upholds the validity of certain amendments to New York's Rent Stabilization Code (Succession Regulations) adopted by DHCR on April 4, 1990. The Succession Regulations redefine the term "family member" in order to extend succession rights in rent stabilized apartments to certain

occupants not previously possessing such rights. The Succession Regulations also substantially reduce the threshold for qualifying for succession rights. By intent and effect, the challenged regulations transfer a reversionary property interest from petitioners and other owners of rent stabilized apartments to a discrete class of private individuals.

The court below acquiesced in DHCR's violation of petitioners' fundamental rights by failing to apply heightened scrutiny to the challenged regulation, as required by this Court in *Nollan v. California Coastal Commission*. If allowed to stand, the opinion below will create a doctrinal conflict with this Court's careful efforts over the past two decades to extend full constitutional protection to the individual rights of property owners.

Amicus believes that review by this Court is necessary to resolve the conflicts created by the New York Court of Appeal and to reaffirm the fundamental constitutional rights of New York property owners.

DATED: April ____, 1994.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLES OF AUTHORITIES CITED vii

INTEREST OF AMICUS CURIAE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

ARGUMENT 4

I. THE SUCCESSION REGULATIONS UNFAIRLY SINGLE OUT RENTAL PROPERTY OWNERS TO BEAR WHAT SHOULD RIGHTFULLY BE A GENERAL PUBLIC BURDEN 4

II. BY TRANSFERRING PETITIONERS' REVERSIONARY INTEREST TO THIRD PARTIES, THE SUCCESSION REGULATIONS FAIL TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS WITHIN THE MEANING OF THIS COURT'S REGULATORY TAKINGS DOCTRINE 8

III. BY TRANSFERRING PETITIONERS' REVERSIONARY INTERESTS TO THIRD PARTIES, THE SUCCESSION REGULATIONS DEPRIVE PETITIONERS OF ECONOMICALLY VIABLE USE OF THEIR PROPERTY 12

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

Agins v. City of Tiburon,
447 U.S. 225 (1980) 9

Armstrong v. United States,
364 U.S. 40 (1960) 5

Chicago, Burlington & Quincy
Railroad Co. v. Chicago,
166 U.S. 226 (1897) 4-5

First English Evangelical Lutheran
Church of Glendale v. County of
Los Angeles, 482 U.S. 304 (1987) 13

Hodel v. Irving, 481 U.S. 704 (1987) 12

Lucas v. South Carolina Coastal Council,
505 U.S. ___, 120 L. Ed. 2d 798 (1992) 8,12-13

Monongahela Navigation Co. v.
United States, 148 U.S. 312 (1893) 5

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) . . . . . *passim*

Penn Central Transportation Co. v.
City of New York, 438 U.S. 104 (1978) 5

Pennell v. City of San Jose, 485 U.S. 1 (1988) 7

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 7-8

United States Constitution

Fifth Amendment 4

Fourteenth Amendment 4

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INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

This case involves a taking of a valuable property interest without just compensation by the New York State Division of Housing and Community Renewal (DHCR). The taking was accomplished by DHCR's adoption on April 4, 1990, of amendments to the Rent Stabilization Code governing succession rights to rent stabilized apartments (Succession Regulations).

As a side effect of New York City's long and disastrous experiment with rent control, a valuable property right has been created in tenancies in rent controlled or rent stabilized apartments. Since 1987, certain blood relatives have had rights of succession to the tenancy of rent stabilized units upon the death of the tenant of record.

By administrative fiat, DHCR's Succession Regulations redefine the term "family member" so as to vastly expand the population of individuals enjoying succession rights to rent stabilized apartments. This term was precisely defined in preexisting regulations. DHCR's redefinition could not be construed as an attempt to resolve any ambiguity or uncertainty in the Rent Stabilization Code. Rather, the

redefinition serves only to extend succession rights to a new, discrete class of private individuals.

Before the Succession Regulations were promulgated, all rent stabilized leases reflected a clearly defined assignment of property rights. Among the rights assigned by law to apartment owners was the right, under specified circumstances, to reoccupy rent stabilized apartments when the lessor of record failed to renew a lease. By redefining the term, "family member," DHCR has effectively reassigned this reversionary interest from petitioners and other owners to an extensive group of private third parties.

The New York trial court declared the Succession Regulations a valid exercise of DHCR's administrative power. Both the state appellate court and the court below affirmed, holding that no regulatory taking had occurred. In reaching this conclusion, the opinion below seriously misstates and misapplies this Court's regulatory takings doctrine.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's carefully enunciated doctrine of regulatory takings. If allowed to stand, property owners in New York will be confronted with a double standard in the protection of their rights under the

United States Constitution. Regulations that would clearly be struck down as unconstitutional under the precedent set by this Court in *Nollan* and *Lucas* will be upheld and enforced in New York state courts under the decision below.

The regulation upheld in this case by the New York Court of Appeals fails to substantially advance legitimate state interests, deprives owners of economically viable use of their property, and forces a small and powerless minority to bear the full costs of what should rightfully be a general public burden. The doctrinal conflict created by the opinion below therefore extends to every branch of this Court's regulatory takings jurisprudence.

ARGUMENT

I

THE SUCCESSION REGULATIONS UNFAIRLY SINGLE OUT RENTAL PROPERTY OWNERS TO BEAR WHAT SHOULD RIGHTFULLY BE A GENERAL PUBLIC BURDEN

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This prohibition applies against the states via the Fourteenth Amendment. *Chicago,*

Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

The doctrine of regulatory takings fashioned by this Court is at its core an equitable inquiry. This is reflected in the oft-quoted statement that the central purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The strong equitable element of takings jurisprudence reaches back to the nineteenth century, when the purpose of the Takings Clause was seen as "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). More recently, the primary issue in regulatory takings cases has been viewed as a question of when "justice and fairness" demand that burdens not "remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

In *Nollan*, a state agency conditioned a building permit on the conveyance of an easement over the owners' property.

This condition was part of a systematic state program to acquire private beachfront property without paying for it. This Court conceded that the state's acquisition plan might be "a good idea"--*i.e.*, might confer a general public benefit--but nevertheless held that coastal property owners alone could not be singled out to bear the full costs of the program. *Nollan*, 483 U.S. at 692.

The question of unfairly disproportionate impact is the essence of the case at bar. The Succession Regulations identify a discrete population of apartment dwellers as deserving special privileges under the law and award them a valuable property interest in rent stabilized apartments. This property interest is simply seized from petitioners and other rightful owners and transferred to the beneficiaries without compensation. Thus, DHCR advances what it sees as the public welfare at no cost to the City of New York by forcing a small group of property owners to bear the full cost of its largess.

The Succession Regulations have been defended on the grounds that they may benefit the poor, the elderly, and the disabled. In fact, DHCR has made no effort to disqualify the young, the rich, and the able bodied from the benefits of its wealth transfer. More important, however, the relative moral or political merits of the beneficiaries of the

Succession Regulations are not properly at issue. As Justice Holmes remarked over 70 years ago, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

As Justice Scalia has commented, "[t]he fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by the public, into mere 'economic regulation,' which can disproportionately burden particular individuals." *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

Permitting DHCR to accomplish its public welfare objectives by seizing an uncompensated property interest from petitioners would be a classic example of forcing some persons alone to bear a disproportionate share of a public burden which, in all fairness and justice, should be borne by the public as a whole. The problems addressed by the Succession Regulations were not caused by petitioners or other property owners. The plight of the poor, the elderly, and the disabled afflicts society at large, and it is a violation of fundamental concepts of equity to shift the burden of

dealing with those problems onto a small and politically powerless group of individuals.

II

BY TRANSFERRING PETITIONERS' REVERSIONARY INTEREST TO THIRD PARTIES, THE SUCCESSION REGULATIONS FAIL TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS WITHIN THE MEANING OF THIS COURT'S REGULATORY TAKINGS DOCTRINE

The doctrine of regulatory takings originated 72 years ago with Justice Holmes' famous nostrum, "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. Over the ensuing decades courts have struggled to define how far property regulations can go before they go "too far."

Two situations have been identified in which regulations will effect *categorical* or *per se* takings. In these cases--when regulations authorize a physical invasion of private property or deprive an owner of economically beneficial use--there is a violation of the Takings Clause without regard to the public purpose advanced by the measures. *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 812 (1992). When the line is less clear, courts must apply heightened scrutiny to determine whether a challenged regulation fails to "substantially advance legitimate state interests." *Nollan*,

483 U.S. at 834 (citing *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980).

It is obvious that, in a trivial sense, any mechanism that reliably transfers private property to persons or causes favored by the Legislature can be said to "substantially advance" governmental interests. The court below engaged in this sort of semantic game by holding that the Succession Regulations substantially advance the legitimate goal of preventing evictions. *Rent Stabilization Association v. Higgins*, ___ N.Y. 2d ___ (1993), slip op. at 17-18. This is no more than to say that the attempted confiscation of petitioners' property was successful.

Such a finding has no bearing on the "substantial advancement" test enunciated by this Court in *Nollan*. Under *Nollan*, reviewing courts must identify a close causal relationship between a challenged property regulation and the mitigation of some public harm ***that would otherwise be caused by the owner's use of the property***. *Nollan*, 483 U.S. at 837. In the case at bar, the question is not whether the Succession Regulations advance their intended purposes, but whether there is a *close causal nexus* between petitioners' use of their property and the problems the Succession Regulations seek to ameliorate.

When DHCR adopted the Succession Regulations, it cited the public purposes of combating AIDS, poverty, homelessness, and the housing shortage. It is obvious that the Succession Regulations cannot rationally be expected to help ease New York's housing shortage. Indeed, the regulations will actually exacerbate the housing shortage by encouraging single individuals to remain in possession of apartments that in all cases are large enough to house two or more. By the same token, if the Succession Regulations have any net impact on homelessness--none has been demonstrated by DHCR--they can only be expected to ***increase*** the number of homeless by reducing the average occupancy ratio in rent stabilized apartments.

The task before this Court, then, is to determine whether the social problems of AIDS and poverty bear any close causal relationship to petitioners' use of their property. DHCR has never asserted such a causal nexus, and the court below failed to discover one. Yet absent such a nexus, *Nollan* teaches that DHCR's seizure of petitioners' reversionary rights is no more than an "out-and-out plan of extortion" that must be struck down under the Takings Clause. *Nollan*, 483 U.S. at 837.

Nollan requires DHCR to demonstrate a substantial causal relationship between petitioners' rightful enjoyment of

their property rights and the social ills sought to be remedied by the Succession Regulations. It is not up to the courts to imagine such a nexus, and it is not up to petitioners to prove its absence. DHCR has plainly failed to carry its burden of showing any causal relationship between petitioners' property and the problems of AIDS, poverty, or homelessness. Neither has DHCR shown that the challenged amendments would in any way help relieve New York's housing emergency.

By failing to apply any meaningful scrutiny to the legitimacy of the Succession Regulations, the court below reverted to the "minimal rationality" standard of review which this Court has unequivocally rejected for regulatory takings cases. The Succession Regulations abuse New York's authority to regulate the landlord-tenant relationship by employing the Rent Stabilization Code to implement general social welfare policies. This constitutes a manifest failure to substantially advance legitimate state interests as required by this Court in *Nollan*.

III

BY TRANSFERRING PETITIONERS' REVERSIONARY INTEREST TO THIRD PARTIES THE SUCCESSION REGULATIONS DEPRIVE PETITIONERS OF ECONOMICALLY VIABLE USE OF THEIR PROPERTY

When a property regulation fails to substantially advance legitimate state interests, the challenged measure must be struck down under the Takings Clause without further inquiry. However, when the Court does find the substantial nexus required by *Nollan*, the second prong of this Court's regulatory takings doctrine comes into play. Under this line of analysis, a regulation effects a taking if it deprives an owner of economically viable use of property. *Nollan*, 483 U.S. at 834; *Lucas v. South Carolina Coastal Council*, 120 L. E. 2d at 812. If any discrete element of an owner's "bundle" of property rights is extinguished, there has been a regulatory taking under this test. *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987).

In the case at bar, the property interest in question is the reversionary interest in petitioners' rent stabilized apartments. By transferring the reversionary interest in these apartments to third parties, the Succession Regulations completely deprive petitioners of economically viable use (or indeed, any use at all) of these valuable property rights.

The court below avoided striking down the Succession Regulations by asserting that petitioners have not suffered a 100% loss of their reversionary interest. However, as this Court stated in *Lucas v. South Carolina Coastal Council*, ***total*** deprivation of economically viable use is not necessary to effect a taking under this test. *Lucas*, 120 L. Ed. 2d at 815 n.8. Here, there can be no dispute that petitioners' reversionary interest has been subordinated--at the stroke of DHCR's pen--to the claims of an entire class of third parties. Contrary to the holding below, a loss of this magnitude qualifies as deprivation of economically viable use as that terminology has been employed by this Court.

Moreover, the Succession Regulations cannot be saved by claiming that the statutory tenancies they create are not permanent, being limited by the lifetime of the succeeding family members. Even temporary deprivations of protected property interests violate the Takings Clause unless just compensation is paid. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987). Thus, even if it could be shown that DHCR's taking of petitioners' reversionary interest is temporary (and therefore does not completely extinguish those interests), it is an impermissible violation of petitioners' rights under the Takings Clause.

CONCLUSION

In upholding the validity of the Succession Regulations, the New York State Court of Appeals has created a conflict with every element of this Court's regulatory takings jurisprudence. The Succession Regulations were held not to violate the Takings Clause despite the fact that they fail to substantially advance legitimate state interests, deprive owners of economically viable use of their property, and force a small and powerless minority to bear the full costs of what should rightfully be a general public burden. This conclusion reflected the New York court's refusal to subject the Succession Regulations to heightened scrutiny, as required by this Court in *Nollan*.

To resolve these conflicts and to reaffirm the fundamental constitutional rights of New York property owners, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

DATED: April, 1994.

Respectfully submitted,

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